STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
WILDER, P.J., AND TALBOT AND SERVITTO, J.J.

MAJESTIC GOLF, LLC, a Michigan limited liability company,

Plaintiff / Counter-Defendant – Appellee,

v

LAKE WALDEN COUNTRY CLUB, INC., a Michigan corporation,

Defendant / Counter-Plaintiff – Appellant.

Supreme Court
No. 145988

Court of Appeals
No. 300140

Livingston County Circuit Court
No. 09-24146-CZ

Graham K. Crabtree (P-31590)
Thaddeus E. Morgan (P-47394)
Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for the Appellee
124 W. Allegan Street, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

Clifford W. Taylor (P-21293)
Larry J. Saylor (P-28165)
Miller, Canfield, Paddock and Stone, PLLC
Attorneys for the Appellant
One Michigan Avenue, Suite 900
Lansing, Michigan 48933
(517) 374-6304

Patrick T. Reid (P-19317)
Reid and Reid
Co-Counsel for the Appellant
Capital Tower
110 W. Michigan Avenue, Suite 750
Lansing, Michigan 48933
(517) 487-6566

APPELLEE MAJESTIC GOLF, LLC'S
BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

APPELLEE MAJESTIC GOLF, LLC'S
BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Submitted by:

Graham K. Crabtree (P-31590)
Thaddeus E. Morgan (P-47394)
Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for the Appellee
124 W. Allegan Street, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

THE JURISDICTION OF THE SUPREME COURT v

COUNTER-STATEMENT OF QUESTIONS INVOLVED vi

INTRODUCTION 1

COUNTER-STATEMENT OF FACTS 4

A. THE UNDERLYING DISPUTE. 4

1. WALDENWOODS' PLAN FOR DEVELOPMENT AND DEFENDANT'S INCONSISTENT AGENDA 4

2. PLAINTIFF'S REQUESTS FOR THE ROAD CROSSING EASEMENT AND DEFENDANT'S REFUSAL TO GRANT THE REQUIRED CONSENT 10

3. THE NOTICE OF NON-PERFORMANCE, DEFENDANT'S DEFAULT, AND PLAINTIFF'S TERMINATION OF THE LEASE 16

B. THE TRIAL COURT PROCEEDINGS. 21

C. THE DECISION OF THE COURT OF APPEALS. 23

LEGAL ARGUMENTS 24

I. THE STANDARDS OF REVIEW. 24

II. THE TRIAL COURT AND THE COURT OF APPEALS HAVE BOTH PROPERLY CONCLUDED THAT DEFENDANT LAKE WALDEN COUNTRY CLUB WAS IN DEFAULT OF ITS OBLIGATION, UNDER PARAGRAPH 22 OF THE LEASE, TO PROVIDE ITS CONSENT TO THE REQUESTED ROAD CROSSING EASEMENT 25

A. DEFENDANT WAS IN DEFAULT OF ITS OBLIGATION UNDER PARAGRAPH 22 WHEN IT DID NOT PROVIDE THE REQUESTED CONSENT WITHIN 30 DAYS AFTER THE OCTOBER 7, 2008 NOTICE OF NONCOMPLIANCE. 26

B. DEFENDANT'S OBLIGATION TO GRANT ITS CONSENT TO THE REQUESTED ROAD CROSSING EASEMENT WAS CLEARLY ESTABLISHED BY THE UNAMBIGUOUS TERMS OF PARAGRAPH 22. 28

C. DEFENDANT LWCC WAS GIVEN NOTICE IN THE MANNER REQUIRED BY THE GOVERNING TERMS OF THE LEASE. 33

D. PLAINTIFF'S DEMAND FOR COMPLIANCE WAS NOT WITHDRAWN OR OTHERWISE NEGATED BY THE CORRESPONDENCE OF OCTOBER 8 AND 13, 2008. 38

III. THE GOLF COURSE GROUND LEASE AT ISSUE WAS PROPERLY TERMINATED, IN ACCORDANCE WITH ITS CLEAR AND UNAMBIGUOUS TERMS, FOR DEFENDANT'S DEFAULT IN THE PERFORMANCE OF ITS CLEARLY DEFINED OBLIGATION, UNDER PARAGRAPH 22 OF THE LEASE, TO PROVIDE ITS CONSENT TO THE REQUESTED ROAD CROSSING EASEMENT. 41

RELIEF 50

INDEX OF AUTHORITIES

Cases

Alpha Capital Management, Inc. v Rentenbach, 287 Mich App 589; 792 NW2d 344 (2010) 25, 31

Bloomfield Estates Improvement Ass'n of Birmingham, 479 Mich 206; 737 NW2d 670 (2007) 41

Campbell v Homer Ore Company, 309 Mich 693; 16 NW2d 125 (1944) 45

Christner v Anderson, Nietzke & Company, PC, 433 Mich 1; 444 NW2d 779 (1989) 46

DeFrain v State Farm Mutual Auto Insurance Co., 491 Mich 359; 817 NW2d 504 (2012) 24, 37

Foundation Development Corporation v Loehmann's, Inc., 163 Ariz 438; 788 P2d 1189 (1990) 49

Hersey Gravel Co v Crescent Gravel Co, 261 Mich 488; 246 NW 194 (1933) 44

In re State Highway Commissioner, 365 Mich 322; 112 NW2d 573 (1961) 44

Lenawee County Gas & Electric Co., v City of Adrian, 209 Mich 52; 176 NW 590 (1920) 46

Lindsey v Harper Hospital, 213 Mich App 422; 540 NW2d 477 (1995) 24

McDonald v Farm Bureau Insurance Co., 480 Mich 191; 747 NW2d 811 (2008) 46

McPheeters v Birkholz, 232 Mich 370; 205 NW 196 (1925) 44

Michigan Medical Service v Sharpe, 339 Mich 574, 577; 64NW2d 713 (1954) 46

Midwest Bus Corporation v Department of Treasury, 288 Mich App 334; 793 NW2d 246 (2010) 30

Miller v Havens, 51 Mich 482; 16 NW 865 (1883) 44

Picard v Shapero, 255 Mich 699; 239 NW 264 (1931) 34

Rory v Continental Insurance Co., 473 Mich 457; 703 NW2d 23 (2005) 41, 42

Spiek v Michigan Department of Transportation, 456 Mich 331; 572 NW2d 201 (1998) 24

Steinberg v Fine, 225 Mich 281; 196 NW 367 (1923) 44, 45

United Coin Meter Co v Lasala, 98 Mich App 238; 296 NW2d 221 (1980) 44

Village of Grandville v Grand Rapids, Holland & Chicago Railway, 225 Mich 587; 196 NW 351 (1923) 46

White v Huber Drug Co., 190 Mich 214; 157 NW 60 (1916) 45

Wilkie v Auto-Owners Insurance Co., 469 Mich 41; 664 NW2d 776 (2003) 41

Statutes

MCL 554.46 ..... 43, 44, 45

MCL 556.106 31

MCL 600.5714(1)(c)(i) 43

MCL 600.5726 43

MCL 600.5744 43

Rules

17 B CJS, Contracts, § 450 48

1929 CL § 12966 45

Other Authorities

MCR 2.116(C)(10) 3, 24

THE JURISDICTION OF THE SUPREME COURT

The Appellant's jurisdictional summary is correct and complete.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. **DID THE TRIAL COURT AND THE COURT OF APPEALS ERR IN FINDING THAT DEFENDANT LAKE WALDEN COUNTRY CLUB WAS IN DEFAULT OF ITS OBLIGATION, UNDER PARAGRAPH 22 OF THE LEASE, TO PROVIDE ITS CONSENT TO THE REQUESTED ROAD CROSSING EASEMENT?**

Defendant–Appellant Lake Walden Country Club contends the answer should be "Yes."

Plaintiff–Appellee Majestic Golf, LLC contends the answer is "No."

II. **WAS THE GOLF COURSE GROUND LEASE AT ISSUE PROPERLY TERMINATED, IN ACCORDANCE WITH ITS CLEAR AND UNAMBIGUOUS TERMS, FOR DEFENDANT'S DEFAULT IN THE PERFORMANCE OF ITS CLEARLY DEFINED OBLIGATION, UNDER PARAGRAPH 22 OF THE LEASE, TO PROVIDE ITS CONSENT TO THE REQUESTED ROAD CROSSING EASEMENT?**

The trial court answered this question "No."

The Court of Appeals has answered this question "Yes."

Defendant–Appellant Lake Walden Country Club contends the answer should be "No."

Plaintiff–Appellee Majestic Golf, LLC contends the answer is "Yes."

INTRODUCTION

Plaintiff – Appellee Majestic Golf LLC ("Majestic Golf") is the owner and lessor of property in Livingston County which has been leased to Defendant – Appellant Lake Walden Country Club, Inc. ("LWCC") for the construction and operation of a golf course. The litigation leading to the present appellate proceedings has arisen from Plaintiff's termination of the lease for Defendant's persistent failure to comply with its clearly stated obligation, under Paragraph 22 of that agreement, to execute and deliver its consent to a road crossing easement needed for development of adjoining property owned by Plaintiff's parent entity, Waldenwoods Properties, LLC ("Waldenwoods").

Upon consideration of cross-motions for summary disposition, the trial court determined that Defendant had defaulted upon its contractual obligations under Paragraph 22 of the lease, but denied the requested enforcement of the lease's clear and unambiguous forfeiture provision based upon its finding that the breach was not material. On appeal, the Court of Appeals upheld the trial court's finding that Defendant had defaulted upon its contractual obligations, but held that Plaintiff was entitled to have the clear and unambiguous forfeiture provision of the lease enforced as written, and that the trial court had therefore erred in denying the requested enforcement of that provision based upon an equitable weighing of the materiality of the breach.

On appeal to this Court, Defendant LWCC now contends that the trial court and the Court of Appeals have both erroneously concluded that summary disposition was warranted with respect to the requisite default. This claim has been based upon arguments that the lower courts have improperly failed to apply certain provisions of the lease as written, as required by this Court's familiar precedents, and arguments that the circumstances of the matter

present genuine issues of material fact for determination by the trier of fact. As an alternative, Defendant notes that this Court is empowered to adopt a public policy exception to those same ubiquitous precedents requiring enforcement of clear and unambiguous contractual language as written – an exception providing a special rule for termination and forfeiture provisions in lease agreements – and suggests that the Court of Appeals' decision should be reversed, and the trial court's decision reinstated, if such an exception should be adopted.

Plaintiff Majestic Golf contends that Defendant's claims of error should be rejected for lack of merit, for all of the reasons discussed in greater detail below. Defendant's default has been well established, as properly found by the trial court and the Court of Appeals, and the Court of Appeals has correctly determined that Plaintiff was improperly denied enforcement of its rights under the clear and unambiguously stated terms of the lease.

A careful review of the pertinent lease provisions and the lower court findings will disprove Defendant's claim that the lower courts have failed to properly apply the notice and default provisions of the lease as written. The Court will see that this claim has not been based upon the clear language of the agreement; Defendant has proposed interpretations inconsistent with the plain meaning of the language used, and invited this Court to read additional requirements into the provisions in question – an invitation which must be declined as inconsistent with this Court's precedents.

A careful and thorough review of the evidence presented to the trial court will reveal that there are no questions of material fact with respect to Defendant's default. The Court will see that Defendant's claims to the contrary have been built upon mischaracterizations of the evidence and incomplete, unsupported, or misleading representations of fact which cannot withstand scrutiny.

The findings of the trial court and the Court of Appeals with respect to the Defendant's default are well supported, both factually and legally. Those factually-driven findings do not provide any opportunity or necessity for this Court to settle any legal issue of significance to the jurisprudence of the state. There is no necessity for the Court to emphasize that trial and appellate courts must apply all provisions of a contract as written – a conclusion which necessarily follows from this Court's existing precedents. Nor is there any need for clarification of the procedure and standards for adjudication of motions for summary disposition under MCR 2.116(C)(10). The standards have been properly applied, and the lower courts have appropriately concluded that there is no question of material fact with respect to Defendant's default. Their findings on this point are well supported, and should therefore be affirmed.

Defendant's alternative suggestion should also be rejected. No Michigan authority permits a weighing of "materiality" in a case such as this, where a default is clearly shown and the lease agreement in question has clearly and specifically authorized termination of the lease as an agreed-upon remedy for the established default. Denial of Plaintiff's right to enforce that remedy based upon a judicial weighing of materiality is contrary to the well-established precedents of this Court holding that clear and unambiguous contractual language must be enforced as written. Defendant has not shown that there is any legitimate need for a "public policy" exception applicable to lease forfeiture provisions, and indeed, it has stopped short of specifically requesting that such an exception be adopted by this Court in this case. Plaintiff Majestic Golf respectfully suggests that if an exception is to be established, it should be created by way of duly-enacted legislation, not by judicial policy making.

Furthermore, even if a weighing of materiality could be found appropriate, there was clearly no basis for the trial court's finding that the breach establishing the default was not material under the unique circumstances of this case. The evidence disclosed in discovery has shown that the breach leading to the default in this case was not a technical, inadvertent or insignificant failure; that it was, instead, a flagrant and willful disregard of a clearly-stated obligation of great importance to the lessor and its parent entity, initiated and continued in bad faith for the purpose of preventing the desired development of Waldenwoods' adjoining property and/or securing an unfair advantage in negotiation of the contemplated merger. The Court should note, in this regard, that Plaintiff challenged the trial court's finding regarding the materiality of the breach in its appeal to the Court of Appeals, but the Court of Appeals did not reach that issue, having determined that a weighing of materiality was not permitted. If this Court should ultimately adopt a new rule allowing a weighing of materiality in these circumstances, it should conclude that the breach **was** material in light of the undisputed evidence, or remand the case to the Court of Appeals for its further consideration of this question.

COUNTER-STATEMENT OF FACTS

A. THE UNDERLYING DISPUTE.

1. WALDENWOODS' PLAN FOR DEVELOPMENT AND DEFENDANT'S INCONSISTENT AGENDA.

Plaintiff Majestic Golf is a Michigan limited liability company created and wholly owned by Waldenwoods Properties, LLC ("Waldenwoods" or "WPL"). Waldenwoods leased property in Hartland Township, Livingston County, to Defendant LWCC for construction and operation of a golf course pursuant to a ground lease ("lease") executed between those parties

in December of 1992.[1] At all times pertinent to this litigation, LWCC has operated a 27-hole golf course – "The Majestic at Lake Walden" – on the leased property pursuant to that lease.

The leased property upon which the golf course has been built and operated (the "golf course property") consists of several separate, irregularly shaped parcels or "islands" of land bordering, and in many cases surrounded by, adjoining property owned by Waldenwoods, connected by easements over the adjoining or surrounding property.[2] Portions of the adjoining property owned by Waldenwoods have been developed with residential and commercial uses, and Waldenwoods has further plans for development of the remainder of its property – development which is expected to include construction of highly attractive residential dwelling units on land bordering the existing golf course. Plaintiff Majestic Golf holds fee simple title to the golf course property pursuant to a conveyance from Waldenwoods, and has succeeded to its interests as lessor of the golf course property pursuant to an assignment of the lease.

---

[1] Copies of the ground lease, together with five separate documents purporting to be amendments executed on April 8, 1993, February 7, 1994, and March 1, 1994, have been included in the Appellant's Appendix at pages 49a through 94a. Plaintiff Majestic Golf has included separate copies of these documents in its Appellee's Appendix at pages 1b through 45b, because the copies of the documents submitted in the Appellant's Appendix include several handwritten notes which were not part of the agreements or relevant to the issues raised on appeal. But more importantly, the copies of three of the lease amendments included in the Appellant's Appendix are incomplete or inaccurate. First, the pages included as pages 85a and 86a are not a part of the Second Amendment which appears, in its entirety, on page 84a. Those pages appear to be excerpts of a memorandum of undisclosed origin, bearing handwritten notes. Second, the copy of the Fourth Amendment included as pages 88a and 89a is incomplete, as it does not include the third page bearing the signature of LWCC's President. Third, it is most important for the Court to note that the document presented as the third page of the Fifth Amendment on page 92a is not the true third page of that Amendment, which includes additional substantive content; the document included at page 92a appears, instead, to be the third page of the Fourth Amendment properly included in the Appellee's Appendix at page 40b.

[2] The layout of the golf course property and the surrounding property is illustrated by the site plans which were attached to the ground lease as Exhibit A. (Apx. pp. 46b-48b)

It is important to note, at the outset, that the golf course property at issue is only one part of W. Frank Crouse's longstanding plan for the development of a rather unique residential-recreation community on property which has been in the Crouse Family for over 150 years. Mr. Crouse is the manager of Majestic Golf, and is also a manager of Waldenwoods, which, as previously noted, owns the land surrounding the golf course property. (Crouse Affidavit, ¶ 3 – Apx. p. 103a) Beginning in 1991, Waldenwoods began planning for a golf course-real estate development on approximately 1,400 acres of its property in Hartland Township. (Crouse Affidavit, ¶ 4 – *Id.*)[3] The principals of what eventually became LWCC were selected by Waldenwoods to construct and operate the golf course portion of the development, and LWCC entered into the lease on December 8, 1992. (Crouse Affidavit, ¶ 5 – *Id.*)

As envisioned, Waldenwoods' plan for development of the contemplated residential-recreation community depended upon its ability to secure necessary road crossing easements across the golf course property to ensure that the planned developments of its adjoining property could be tied together cohesively. (Crouse Affidavit, ¶ 4 – *Id.*) The need for, and critical importance of, these road crossing easements for the protection and development of Waldenwoods' adjoining property was specifically discussed prior to the execution of the lease and the subsequent construction of the golf course. (Crouse Affidavit, ¶ 5 – *Id.*)

To protect these important interests, Paragraph 22 of the lease specifically requires LWCC to grant easements over the golf course property for drainage, utilities and road

[3] As discussed in greater detail below, it has always been Waldenwoods' objective to develop the contemplated residential-recreation community as a planned development pursuant to a master plan, approved as such by Hartland Township, to ensure preservation of the golf course property as open space.

crossings, **subject to only two requirements**: 1) That the easements be located in areas mutually agreeable to the parties; and 2) That the utilities and roads be installed so as to ensure the integrity of the golf course, leaving it in equal or better condition:

> "22. **LANDLORD'S EASEMENTS AND ROAD CROSSINGS.** Tenant shall permit drainage and utility easements and road crossings to be developed by Landlord on the Premises as required to permit development to occur on Landlord's Other Real Estate. The easements and crossings shall be installed by Landlord at its expense but located in areas mutually agreeable. The utilities and roads shall be installed in such a manner as to ensure that the integrity of the golf course in [*sic*] preserved, leaving the golf course in equal or better condition." (Apx. p. 20b)

Pursuant to Paragraph 17 of the lease, LWCC was granted an option to purchase the golf course property, subject to the terms provided therein, during the last ten years of the 25-year lease term. Paragraph 17 specifically provided, however, that the option could only be exercised if the tenant was not in default of the lease at the time of exercise, and that the option would be automatically terminated on termination of the lease. (Apx. pp. 16b-17b)

The terms of the lease were amended by five separate amendments executed on April 8, 1993, February 7, 1994, and March 1, 1994. (Apx. pp. 34b-45b) The Fifth Amendment of the lease, executed on March 1, 1994, provided, in part, that certain provisions of the lease would survive transfer of title to the golf course property if LWCC sought to exercise the option to purchase provided in Paragraph 17. (Apx. pp. 41b-44b) Included among the several provisions which would survive transfer of title, were the restrictions in Paragraph 3 of the lease that the property could only be used as a golf course and the provision requiring consent to necessary easements contained in Paragraph 22. The Fifth Amendment of the lease made it clear that these lease provisions which would survive transfer of title would "run with and be a burden" on the golf course property. (Apx. p. 43b) Mr. Crouse made it clear to LWCC at the time of negotiating the Fifth Amendment that its provisions were of critical importance to

ensure that Waldenwoods' property would be protected, and that the overall community could materialize. It was always intended that the aforementioned restrictions imposed by the Fifth Amendment would take the form of recorded restrictions, since they were to "run with the land and be a burden" on the golf course property. (Crouse Affidavit, ¶ 7 – Apx. p. 104a)

Pursuant to the terms of the lease, LWCC became eligible to exercise its option to purchase in 2008. But in 2003, well in advance of that eligibility, discussions of a possible joint venture or merger were initiated between Waldenwoods, as the owner and lessor of the golf course property, and LWCC, as tenant and operator of the golf course. As these discussions progressed, they contemplated the creation of a new business entity through which the golf course property and improvements would be jointly owned – an alternative which, at the time, was seen by all concerned as preferable to a sale of the golf course property under the option to purchase provided in Paragraph 17 of the lease. (Crouse Affidavit, ¶ 13 – Apx. pp. 105a-106a)[4]

In January of 2007, Waldenwoods formed Plaintiff Majestic Golf to be used as the entity to which the golf course property would be conveyed, and by which the golf course property would ultimately be jointly owned, pursuant to the contemplated merger. As noted previously, Majestic Golf is a Michigan limited liability company created and owned by Waldenwoods. Waldenwoods has been sole member of Majestic Golf at all times since its creation. (First Amended Complaint, ¶ 14 – Apx. p. 126b) On April 3, 2007, Waldenwoods conveyed the golf course property to Majestic Golf. (Crouse Affidavit, ¶ 9 – Apx. p. 105a)

[4] *See also*, First Amended Complaint, ¶ 10, and Defendant's answer thereto. (Apx. pp. 125b, 113a)

Preliminary agreements in the merger discussions contemplated that LWCC would acquire an 85% membership interest in Majestic Golf, with all assets of LWCC relating to the operation of the golf course being transferred to Majestic Golf. Under this arrangement, the lease would be terminated, and restrictive covenants governing the use of the golf course property and operation of the golf course would be imposed upon the golf course property for the benefit of Waldenwoods, as owner of the adjoining property. For its contribution of the land, which would remain titled in Majestic Golf, Waldenwoods would retain a 15% membership interest in Majestic Golf – a percentage which the parties had agreed was the value of the land in relation to the overall golf course enterprise. (Crouse Affidavit, ¶ 13 – Apx. p. 106a)

Waldenwoods was later surprised to learn that LWCC had harbored a hidden agenda. Evidence disclosed in discovery clearly suggests that LWCC had begun to contemplate a scheme to thwart Waldenwoods' efforts to secure Hartland Township's approval of its planned development master plan as early as 2003. A 2003 legal Memorandum produced in response to discovery is especially telling in this regard. That Memorandum, dated May 8, 2003 (Apx. pp. 49b-55b),[5] addresses legal questions regarding the Hartland Township Zoning Ordinance, and specifically postulates how LWCC, by exercising the option to purchase in the lease, could prevent approval of the contemplated master plan by claiming to be an owner of some of the property of the planned development and, therefore, a necessary signatory to the application for preliminary approval. (Apx. pp. 49b-52b)

[5] It is noteworthy that this legal memorandum is addressed to Gail A. Anderson from David E. Pierson, both of whom are law partners of Gregory L. McClelland, who served as LWCC's trial and appellate counsel in the lower court proceedings, as evidenced by the letterhead of correspondence filed in the Court of Appeals on behalf of LWCC in this matter.

Although this legal Memorandum was not discovered before the commencement of this litigation, a sign of Defendant's treachery was seen in 2006. In that year, Waldenwoods engaged a lawyer to assist in preparing a protest of its 2005 property tax assessments. During a 2006 meeting with the attorney, Mr. Crouse was advised that the attorney had been contacted by an individual inquiring how to break golf course restrictions with specific mention of the golf course at issue. Mr. Crouse confronted LWCC board member James Hile about this, but Mr. Hile disclaimed any knowledge on the part of LWCC. Subsequently, in 2008, Mr. Hile admitted to Mr. Crouse that indeed an inquiry had been made by Andrew Goldstein, an LWCC shareholder and the attorney who had negotiated the lease on behalf of LWCC. (Crouse Affidavit, ¶ 22 – Apx. p. 110a)

2. PLAINTIFF'S REQUESTS FOR THE ROAD CROSSING EASEMENT AND DEFENDANT'S REFUSAL TO GRANT THE REQUIRED CONSENT.

The road crossing easement request to which Defendant refused to consent, ultimately resulting in the termination of the lease, was first made to LWCC by Mr. Crouse in October of 2006. (Crouse Affidavit, ¶ 8 – Apx. pp. 104a-105a) In an October 27, 2006, letter to LWCC's President, Pat Hayes (Apx. pp. 56b-59b), Mr. Crouse recounted his continuing efforts to secure prompt approval of his planned development master plan and characterized this easement request as a "significant request," emphasizing that the requested easement was "an essential part" of Waldenwoods' "evolving plan," for which LWCC's concurrence was needed. (Apx. pp. 56b-57b) In his supporting Affidavit, Mr. Crouse has explained that obtaining the requested road crossing easement was a "necessary precondition" for finalizing Waldenwoods' master plan approval of its planned development by Hartland Township – that

the plans could not be completed, and the required approval obtained, without the road crossing easement. (Crouse Affidavit, ¶ 8 – Apx. pp. 104a-105a) [6]

On April 26, 2007, Majestic Golf presented the requested road crossing easement to LWCC for its consent pursuant to Paragraph 22 of the lease in the form of a proposed "Grant of Easement." (Apx. pp. 60b-70b)[7] Having obtained fee title to the golf course property and succeeded to Waldenwoods' rights under the lease, Majestic Golf was empowered to grant the easement over the golf course property for the benefit of Waldenwoods, so that it could proceed with its development. (Crouse Affidavit, ¶ 10 – Apx. 105a) Thus, the only impediment was obtaining LWCC's consent and agreement as to the location.

In May of 2007, Mr. Crouse was advised that LWCC's land use committee had recommended approval of the requested easement with some conditions, none of which dealt with the location of the proposed easement. (Crouse Affidavit, ¶ 11 – Apx. p. 105a; First Amended Complaint, ¶ 18, and Defendant's answer thereto – Apx. pp. 126b, 115a).[8] In a subsequent meeting of June 1, 2007, between representatives of Majestic Golf and LWCC, the recommendations of the LWCC land use committee regarding the proposed easement

---

[6] As discussed in the letter of October 27, 2006, the road crossing easement was requested to provide access across the golf course property, between holes 21 and 22, to connect a portion of Waldenwoods' adjoining land in the northwest corner of its property with the centrally-located portion of its adjoining property north of Crouse Road. *See,* reduced site plan "1c," (Apx. p. 47b) The full-size Site Plan (Complaint, Exhibit 2) is also available for review.

[7] The dimensions and location of the requested easement are depicted in the drawings attached as exhibits to the Proposed Grant of Easement. (Apx. 65b-66b) Defendant has admitted that this requested easement was submitted to LWCC with a memorandum or document dated April 27, 2007, referencing a "proposed golf course crossing." (Response to Request to Admit No. 5 – Apx. pp. 75b-76b)

[8] Defendant has admitted that its land use committee recommended approval of Plaintiff's easement request on May 3, 2007, but has asserted that the committee made subsequent recommendations for changes to the proposed easement. (Response to Request to Admit No. 6, Apx. p. 76b)

were discussed, and it was agreed that the proposed Grant of Easement would be revised to incorporate agreed-upon changes.[9]

On June 19, 2007, Mr. Crouse sent an e-mail message to LWCC Secretary James Hile, confirming that Majestic Golf's attorney would be making the agreed changes to the easement, and exhorting LWCC to concur in the request promptly "so that it can be processed and recorded," noting that "without this [the easement], we will be unable to move forward to complete our design." Mr. Hile responded to that e-mail, stating that "Pat will be working with Doug Austin on both of these agreements. It is our intent to move forward as expeditiously as possible to finalize and sign both of these agreements within the next 90-120 days, per the June 1 letter." In a follow-up response sent to Mr. Hile later the same morning, Mr. Crouse stated "I think its important that we get approval right away of this easement – we need that approval to complete a master plan with the Township – which we are still going to attempt. A meeting has been scheduled – and its back on the fast track." To this message, Mr. Hile responded "I'll do my best to keep this fast tracked with our team." (Apx. pp. 88b-91b)[10]

On November 5, 2007, Mr. Crouse delivered to LWCC a revised version of the proposed Grant of Easement incorporating portions of the conditions recommended by LWCC's land use committee. (Crouse Affidavit, ¶ 12 – Apx. P. 105a) That revised Grant of Easement (Apx. pp. 92b-102b) located the road crossing easement in precisely the same location as originally proposed. As noted previously, none of the land use committee's

[9] *See,* First Amended Complaint, ¶ 19, and Defendant's response thereto. (Apx. pp. 127b, 115a); June 1, 2007 – Meeting Recap – Apx. pp. 85b-87b)

[10] Defendant has acknowledged this exchange of e-mail messages on June 19, 2007. (Response to Request to Admit No. 8 – Apx. p. 77b)

recommendations had been concerned with the location of the road crossing easement. (Crouse Affidavit, ¶ 11 – Apx. p. 105a)

The revised Grant of Easement delivered on November 5, 2007 included two new provisions designed to ensure protection of the integrity of the golf course by requiring LWCC's approval of all plans for construction within the easement. These new requirements appeared in the form of a new Paragraph 6, providing that "All construction within the easement shall be undertaken only pursuant to written plans approved by Lake Walden Country Club," and a new Paragraph 7, providing that "All reasonable care shall be taken during construction not to disturb the treescape north of and behind hole No. 21. The construction plans referred to in paragraph 6 shall describe the efforts to be taken to comply with this requirement." (Apx. p. 94b)

Although LWCC was well aware of Mr. Crouse's clearly expressed desire to secure a prompt approval of the road crossing easement, it did not execute the revised Grant of Easement and return it to Majestic Golf in November of 2007, or at any other time prior to the subsequent termination of the lease in November of 2008. Nor did any representative of LWCC ever propose an alternative document that LWCC would be willing to execute and deliver, or discuss any open issues regarding the easement with Mr. Crouse, during that time. (Crouse Affidavit, ¶ 12 – Apx. p. 105a)

In December of 2007, LWCC's business lawyer, Patrick Reid, prepared the initial draft of the merger documents (Apx. pp. 103b-116b) and delivered them to Majestic Golf on December 10, 2007. (Crouse Affidavit, ¶ 14 – Apx. p. 106a; First Amended Complaint, ¶ 24, and Defendant's response thereto – Apx. pp. 128b, 116a) By the provisions of Paragraph 8a of the proposed merger "Agreement," LWCC acknowledged its obligation to execute and

deliver the road crossing easement, but linked the execution and delivery of the "Road Easement" to the closing of the proposed merger. (Apx. p. 107b) But the proposed merger "Agreement" delivered to Majestic Golf on December 10, 2007 did not include a copy of the proposed easement to be consented to at the closing of the merger.[11]

On December 17, 2007, LWCC's counsel, Mr. Reid, sent an e-mail message to James Hile and LWCC's negotiator, Richard Henderson, stating that a revised road easement, attached thereto, was being sent for review and comments. This message went on to express Mr. Reid's intent to forward the revised easement to Majestic Golf's business counsel, Ed Castellani, on December 19, 2007, if he did not receive any questions or comments. (Apx. p. 117b) The revised easement was not forwarded to Mr. Castellani on December 19, 2007, as proposed; as noted previously, the undisputed evidence has shown that LWCC did not provide any alternative drafts of the road crossing easement or discuss any issues concerning the easement with Mr. Crouse prior to the termination of the lease on November 24, 2008. (Crouse Affidavit, ¶ 12 – Apx. p. 105a)

The proposed merger agreement forwarded to Majestic Golf in December of 2007 contained provisions regarding Waldenwoods' right to buy out shareholders of LWCC that

[11] Plaintiff's First Amended Complaint has alleged that the proposed merger Agreement provided by LWCC's counsel on December 10, 2007 did not include a copy of the proposed easement to be consented to at the closing of the proposed merger, but LWCC has denied this allegation. (First Amended Complaint, ¶ 26, and Defendant's response thereto – Apx. pp. 128b, 116a) But as noted previously, Mr. Crouse's supporting Affidavit has specifically averred that neither LWCC, nor any of its representatives, ever proposed an alternative document that LWCC would be willing to execute and deliver, or discussed any open issues regarding the easement with Mr. Crouse, at any time between the submission of Majestic Golf's proposed easement in November of 2007 and the subsequent termination of the lease in November of 2008. (Crouse Affidavit, ¶ 12 – Apx. p. 105a) This specific allegation has not been refuted by any of the affidavits or other documentary evidence submitted by LWCC in support of, or opposition to, the cross-motions for summary disposition filed in this matter.

were drastically different from what Mr. Crouse had expected, based upon the merger negotiations to that point. (Crouse Affidavit, ¶ 14 – Apx. p. 106a) Thus, the revision of the proposed merger agreement submitted to LWCC in February of 2008 involved consideration of a number of important issues.[12] These included questions regarding Waldenwoods' ability to purchase the S-Corporation shares of LWCC's shareholders and the need for recording of deed restrictions to ensure the protection of Waldenwoods' interests – restrictions which were to run with the land pursuant to the Fifth Amendment of the lease.[13] LWCC did not accept the terms as revised, and the parties continued the merger negotiations. (Crouse Affidavit, ¶ 14 – Apx. p. 106a)

It was not until after the redrafted documents had been provided to LWCC in early February of 2008, that Mr. Crouse became fully aware that LWCC was conditioning its consent to the road crossing easement upon completion of the merger. (Crouse Affidavit, ¶ 15 – Apx. pp. 106a-107a) Once Mr. Crouse became aware of this, he strongly voiced his objection to linking the execution of the easement with completion of the merger in

[12] After receiving the draft documents in December of 2007, and until the time that they were revised and submitted to LWCC in early February of 2008, Mr. Crouse focused his attention, and instructed his lawyers to focus their attention, on recalculating formulae and reformulating provisions to reflect his understanding of essential terms of the merger. Mr. Crouse believed that there would be no merger if he and LWCC were unable to come to an agreement on those essential terms. (Crouse Affidavit, ¶ 14 – Apx. p. 106a)

[13] These questions were discussed in some detail in a February 5, 2008 e-mail message from Mr. Crouse to LWCC's negotiator, Richard Henderson (Apx. p. 118b), and a document entitled "Considerations in Establishing a Joint Venture for Majestic Golf" previously created by Mr. Crouse and revised on October 31, 2007. (Apx. p. 119b-120b) The e-mail message of February 5, 2008 informed Mr. Henderson that the necessary deed restrictions were being prepared, and would be filed prior to the execution of the merger documents. (Apx. p. 118b) The document entitled "Considerations in Establishing a Joint Venture for Majestic Golf" expressed Mr. Crouse's desire to ensure that LWCC would fully support Waldenwoods' efforts to secure the Township's approval of its development plans, including its plan for perpetual maintenance of the golf course property as open space. (Apx. p. 120b)

negotiation meetings held on February 29, 2008 and March 25, 2008. *Id.* In one of those meetings, LWCC's negotiator, Richard Henderson, acknowledged the proposed linkage, but denied that he had been the cause of the linkage. *Id.*

By June of 2008, it had become clear to Mr. Crouse that the negotiations were unraveling, and thus, the prospect of completing a merger was becoming more unlikely. (Crouse Affidavit, ¶ 16 – Apx. pp. 107a-108a) In light of this, Mr. Crouse continued to remind LWCC and its representatives that approval of the road easement was not contingent upon successful merger discussions, and that LWCC was obligated to accede to Majestic Golf's request for consent to the same. *Id.* By October of 2008, Mr. Crouse had reiterated Majestic Golf's request for LWCC's consent to the road crossing easement, first presented for approval in April of 2007, on no less than five occasions – May 3, 2007, June 1, 2007, November of 2007, and in meetings held on February 29, 2008 and July 23, 2008. *Id.*

Despite these communications, and despite Mr. Crouse's objection to linkage of the easement with the merger in the Spring of 2008, LWCC still did not execute and deliver any form of the requested road crossing easement, nor did it present any draft of an alternative easement that it would be willing to execute and deliver or make any effort to discuss any open issues regarding the easement with Mr. Crouse. (Crouse Affidavit, ¶ 16 – Apx. pp. 107a-108a) LWCC's failure to provide its consent to the repeatedly requested road crossing easement has thwarted Waldenwoods' ability to complete its planned development master plan and obtain the necessary Township approval for that development. *Id.*

3. THE NOTICE OF NON-PERFORMANCE, DEFENDANT'S DEFAULT, AND PLAINTIFF'S TERMINATION OF THE LEASE.

By October of 2008, the negotiations between the parties had failed to yield an agreement with respect to the unresolved issues pertaining to the contemplated merger. On

October 8, 2008, Mr. Crouse mailed a letter, dated October 7, 2008, to LWCC's President, Pat Hayes, requesting prompt consent to, and return of, a "Grant of Easements" enclosed therewith. (Apx. pp. 175a-188a)[14] The enclosed "Grant of Easements" had been executed by Waldenwoods and Majestic Golf, as owner of the golf course property, and included a "Consent to Grant of Easements" for execution by LWCC. (Crouse Affidavit, ¶ 17 – Apx. p. 108a). The letter (Apx. p. 175a) mentioned Majestic Golf's prior requests for consent to the road crossing easement required by Paragraph 22, noted LWCC's past failure to provide the requested consent, stated that concurrence was "urgently required," and requested that LWCC sign and return the enclosed consent, to fulfill its obligation under the lease, within 30 days:

> "Dear Mr. Hayes:
>
> "I am writing on behalf of both Waldenwoods Properties, LLC and Majestic Golf, LLC to request that you execute the Consent portion of the enclosed Grant of Easement and return it to me for recording. As you will recall, Section 22 of the golf course lease obligates Lake Walden to permit road crossing easements when required by Waldenwoods for development of its adjoining land. Sometime ago Waldenwoods requested a crossing easement from Majestic Golf, which owns the golf course land. Majestic Golf approved the request, and on that basis a proposed easement between Majestic and Waldenwoods was sent to Lake Walden on April 26, 2007 for review and consent.
>
> "Following receipt and review of the document, you requested some changes. Those were made, and the document was resubmitted to golf course management with a request to execute the Consent. This occurred, I believe, late in 2007. Despite the request, the written Consent has not been received. Concurrence by Lake Walden is urgently required.
>
> "I am requesting that Lake Walden fulfill its obligations under the lease. Please sign and return the enclosed consent within thirty (30) days.
>
> "W. Frank Crouse
> Manager, Waldenwoods Properties, LLC and
> Manager, Majestic Golf, LLC"

[14] The Court should note that the "Grant of Easements" enclosed with Mr. Crouse's letter of October 7, 2008 was identical, in all material respects, to the "Grant of Easement" previously submitted to LWCC in November of 2007.

On October 8, 2008, Mr. Crouse sent a separate e-mail message to James Hile and Pat Hayes, reiterating his request that LWCC provide its approval of the crossing easement as required by Paragraph 22 of the lease, and noting that its failure to do so had been "a major reason why we were not able to finalize a master plan for our property." In this message, Mr. Crouse expressed his hope that a merger agreement could still be finalized, but noted that critical issues had remained unresolved after the last meetings, and thus, he had found it necessary to prepare for the possibility that the merger would not be completed "because the differences are found to be irreconcilable." (Apx. pp. 173a-174a)

In a subsequent letter of October 13, 2008 to Pat Hayes (Apx. pp. 168a-172a), Mr. Crouse responded to an October 10, 2008 e-mail message in which Mr. Hayes had suggested that it was "not a good idea" to step outside of the previously-defined process for negotiation of the contemplated merger. In that letter, Mr. Crouse provided a detailed summary of the events and issues which had led to an unraveling of the negotiations in July and August of 2008. This letter reveals that there were two issues in particular which had led to a "slow death" of the process: 1) The refusal of LWCC's negotiator, Dick Henderson, to consider Mr. Crouse's requests for inclusion of provisions allowing Waldenwoods to cut and trim trees and brush on the golf course property (under the direction and supervision of LWCC) to maintain the valuable golf course views for the homes to be constructed on Waldenwoods' property bordering the golf course; and 2) The refusal of Mr. Henderson to agree to inclusion of provisions guaranteeing that the golf course property would be included as open space in the planning of the overall community. (Apx. pp. 168a-170a) Mr. Crouse went on to state his opinion that "without agreement on these matters, the original design objectives for a Residential-Recreation Community will no longer be possible. We are simply unwilling to

accept that." He concluded the letter with his observation that: "It is very clear to me that we are headed for a train-wreck, unless something extraordinary and unexpected happens." (Apx. pp. 171a-172a)

In light of the views expressed in this correspondence, it should have been abundantly clear that completion of the contemplated merger was by no means assured, and Mr. Crouse's letter of October 7, 2008 had made it clear that he expected to receive the required approval of the requested easement without further delay. It should be noted, in this regard, that Mr. Crouse's demand was promptly shared with LWCC's attorney, Patrick Reid, its Secretary, Mr. Hile, and its negotiator, Mr. Henderson; an e-mail message sent by Mr. Reid to Mr. Henderson and Mr. Hile on October 20, 2008 stated "I have attached the Grant of Easement which is the Easement Frank has been requesting for the road." (Apx. p. 121b)

Despite this internal consultation, LWCC did not execute and return the Consent to Grant of Easements within 30 days, as requested in Mr. Crouse's letter of October 7, 2008. Instead, on November 10, 2008 – **beyond the expiration of the 30-day period** – LWCC presented Majestic Golf with redrafted merger documents which LWCC said it would not negotiate. (Crouse Affidavit, ¶ 18 – Apx. p. 108a) Neither Mr. Crouse, nor his attorneys, were permitted to review these "take it or leave it" documents prior to their presentation on November 10, 2008. The "take it or leave it" merger documents did not include an executed consent to the requested easement, or even a draft of a consent to the easement. Instead, the documents continued to provide that execution and delivery of any consent to easement was conditioned upon execution and delivery of the merger documents. In addition, many of the restrictions on the golf course property set forth in the Fifth Amendment to the lease –

restrictions that LWCC knew were of critical importance to Waldenwoods and Majestic Golf – were significantly revised or eliminated entirely. *Id.*

On November 24, 2008, Majestic Golf terminated the lease pursuant to its Paragraph 26 D. for LWCC's default in the performance of its obligations under Paragraph 22, and provided notice of the termination to LWCC on that date by a letter from its attorney, Douglas Austin, with an accompanying "Notice to Quit – Termination of Tenancy." (Apx. pp. 165a-167a; Crouse Affidavit, ¶ 20 – Apx. p. 109a) Mr. Crouse's letter of October 7, 2008 had provided ample notice of LWCC's noncompliance with Majestic Golf's requests for its required consent to the road crossing easement, and requested that the required consent be provided within 30 days. Thus, LWCC's continued failure to provide its consent to the requested road easement as required by Paragraph 22 of the lease constituted a default for which termination of the lease was authorized under the clearly stated terms of Paragraph 26:

> "26. **DEFAULT**. Each of the following events shall be a default hereunder by Tenant and a breach of this Lease.
>
> * * *
>
> "D. If Tenant shall fail to perform any of the agreements, terms, covenants, or conditions hereof on Tenant's part to be performed (other than payment of rent) and such non-performance shall continue for a period within which performance is required to be made by specific provision of this Lease, or if no such period is so provided for, a period of thirty (30) days after notice thereof by Landlord to Tenant, or if such performance cannot be reasonably had within such thirty (30) day period, Tenant shall not in good faith have commenced such performance within such thirty (30) day period and shall not diligently proceed therewith to completion;
>
> * * *
>
> "If any event specified above shall occur and be continuing, Landlord shall have the right to cancel and terminate this Lease, as well as all of the right, title and interest of Tenant hereunder. (Apx. pp. 21b-23b)

Paragraph 27 of the lease provided for forfeiture of permanent improvements following termination of the lease for the tenant's default:

"27. **EFFECT OF DEFAULT ON IMPROVEMENTS.** If at any time Tenant defaults on the Lease resulting in a termination of the Lease in accordance with Paragraph 26, all permanent improvements to the land will remain, and Tenant will be allowed to remove all portable equipment and inventory, including, but not limited to, golf carts, maintenance equipment, clubhouse furnishings and clothing items, all of which will first be offered for sale at fair market value to Landlord. The retention of the improvements will be the sole recourse by Landlord for liabilities of Tenant first arising after termination of the Lease." (Apx. p. 24b)

By subsequent correspondence of December 11, 2008, **after** the termination of the lease, LWCC's attorney informed Majestic Golf's attorney that LWCC was willing to consent to the road crossing easement in the same location as initially proposed and requested in April of 2007. (Crouse Affidavit, ¶ 20 – Apx. p. 109a)[15]

On December 22, 2008, nearly a month after the termination of the lease, LWCC's counsel informed Majestic Golf's attorney that LWCC intended to exercise the option to purchase the golf course property under Paragraph 17 of the lease. (Apx. p. 147a) By prompt response of December 29, 2008, Majestic Golf's attorney informed LWCC's counsel that the option could no longer be exercised, as it had ceased to exist upon the termination of the lease. (Apx. p. 122b)

B. THE TRIAL COURT PROCEEDINGS.

In the litigation arising from this dispute, Plaintiff Majestic Golf sought to regain possession of the leased golf course property. In Count I of its First Amended Complaint (Apx. pp. 130b-131b) Plaintiff sought specific performance of Paragraph 29 of the lease, which requires Defendant LWCC to surrender the premises and all improvements upon termination of the lease. Count II sought a declaration that Defendant's attempt to exercise

[15] *See,* December 11, 2008 correspondence from LWCC's counsel with attached ***unexecuted*** "Grant of Easement" (Apx. pp. 148a-164a)

the option to purchase was ineffective because the option was terminated with the termination of the lease before Defendant attempted to exercise the option. (Apx. pp. 131b-132b)[16]

Defendant LWCC filed a Counterclaim with two counts. (Apx. pp. 141a-144a) Count I of the Counterclaim requested specific performance of the lessor's obligations under the option to purchase and appraisal provisions. Specifically, this Count asked the court to find that LWCC was not in default, that the lease was not properly terminated, and that the option to purchase was therefore properly exercised. Count II of Defendant's Counterclaim requested a declaration that the lease was not terminated, that Defendant was not in default when the option to purchase was exercised, and that certain deed restrictions recorded by Majestic Golf during the merger negotiations[17] were an invalid lien against the property. Count II of the Counterclaim also requested that the court enter a recordable judgment quieting title.

---

[16] Counts III, IV and V of the First Amended Complaint requested alternative forms of relief. Count III requested a stay of the appraisal process required under the terms of the lease pertaining to the option to purchase, pending the court's ruling as to whether the option was properly exercised. Count IV requested a declaration that Paragraph 27 of the lease did not relieve Defendant of liability for paying the reasonable rental value of the property after termination of the lease, a declaration that the reasonable rental value of the property post-termination was at least $6,250 per month, and an order requiring Defendant to pay this reasonable value during the pendency of this litigation. Count V requested a declaration that Defendant's submission of an appraisal showing a negative value was done in bad faith, and that by doing so, Defendant breached the terms of the option. (Apx. pp. 133b-141b)

[17] Mr. Crouse's supporting Affidavit has explained that deed restrictions reflecting the rights granted to Plaintiff and the obligations imposed upon LWCC by the Fifth Amendment of the lease had been recorded with the Livingston County Register of Deeds in February of 2008. After these restrictions were recorded, LWCC objected to some of their provisions, and further discussions produced a new version of the restrictions that was acceptable to all. (Crouse Affidavit, ¶ 21 – Apx. p. 109a-110a)

In footnote 5 on page 9 of Defendant's brief, Defendant has complained that the deed restrictions conferred an "unqualified right" upon Waldenwoods to enter onto the golf course and cut trees that might obstruct views from residential sites on adjoining properties, and that they established a right of re-entry and reverter of title for violations committed by third parties. Two points must be made in response to these complaints to ensure that the Court is not mislead. First, it is inaccurate to claim that these deed restrictions conferred an

On cross-motions for summary disposition, the trial court determined that LWCC had breached its obligations under the terms of the lease by virtue of its continued failure to provide the required approval of the requested road crossing easement, but that the breach was not a material breach sufficient to warrant the termination of the lease. Thus, in its Opinion and Order entered on December 23, 2009 (Apx. pp. 39a-48a), the trial court denied Plaintiff's motion for summary disposition and granted summary disposition in favor of the Defendant with respect to Plaintiff's claims for specific performance and declaratory relief. (Apx. pp. 41a-48a) The trial court also concluded that LWCC had not cured its default when it attempted to exercise the option to purchase, and thus, the option had not been effectively exercised. Accordingly, the court denied Defendant's request for specific performance of the lease's obligations concerning the option to purchase. (Apx. pp. 47a-48a)

C. THE DECISION OF THE COURT OF APPEALS.

In its Opinion of July 10, 2012 (Apx. pp. 19a-33a), the Court of Appeals approved the trial court's finding that Defendant defaulted upon its obligations under Paragraph 22, but disagreed with its conclusion that the lease was improperly terminated because the breach was

---

"unqualified right" to cut trees on the golf course property. To the contrary, the amended restrictions recorded on October 3, 2008 specified that:

> "the benefitted party is authorized to trim, prune and cut trees, brush and other vegetation on the Property which impair these reasonable and appealing views. Panoramic views of the Golf Course are not contemplated. Similarly, extensive cutting of trees that would significantly alter the character of the Golf Course is not contemplated. The work must be undertaken by a landscaping contractor approved by and subject to the control of the Title Holder. The landscaping contractors [*sic*] is to be instructed by the Title Holder to undertake the work to fulfill the purpose of this provision, using good forest and woodlot management practices." (Apx. pp. 269a-270a)

Second, Defendant has neglected to mention that the referenced right of re-entry and reverter of title was not included in the amended deed restrictions, which superseded all of the deed restrictions previously recorded on February 13, 2008. (Apx. p. 263a)

not "material." The Court held, in this regard, that Plaintiff was entitled to terminate the lease for the established default in accordance with the clear and unambiguous terms of the lease agreement, which must be enforced as written regardless of the materiality of the breach in the absence of any showing that enforcement of the forfeiture provision was unlawful or unconscionable.

Following the denial of its motion for reconsideration, Defendant LWCC sought leave to appeal the decision of the Court of Appeals to this Court, which granted leave to appeal by its Order of April 3, 2013. This Appellee's Brief is now respectfully submitted by Plaintiff Majestic Golf in opposition to Defendant's appeal. Additional pertinent fact will be discussed in the Legal Argument, *infra*, to the extent that such discussion may be required to fully inform the Court.

LEGAL ARGUMENTS

I. THE STANDARDS OF REVIEW.

Plaintiff Majestic Golf sought summary disposition in this matter pursuant to MCR 2.116(C)(10). A trial court's decision granting or denying a motion for summary disposition is reviewed *de novo*. *Spiek v Michigan Department of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Lindsey v Harper Hospital*, 213 Mich App 422; 540 NW2d 477 (1995). The proper interpretation of contracts and the legal effect of contractual provisions are also questions of law, reviewed *de novo*. *DeFrain v State Farm Mutual Auto Insurance Co.*, 491 Mich 359, 366-367; 817 NW2d 504 (2012).

A contract must be interpreted according to its plain and ordinary meaning. A contract is said to be ambiguous when its words may reasonably be understood in different ways. The trier of fact must determine the meaning of an ambiguous contract, but if contractual language

is unambiguous and no reasonable person could differ concerning application of the term or phrase to undisputed material facts, summary disposition should be awarded to the proper party. *Alpha Capital Management, Inc. v Rentenbach,* 287 Mich App 589, 611-612; 792 NW2d 344 (2010).

II. THE TRIAL COURT AND THE COURT OF APPEALS HAVE BOTH PROPERLY CONCLUDED THAT DEFENDANT LAKE WALDEN COUNTRY CLUB WAS IN DEFAULT OF ITS OBLIGATION, UNDER PARAGRAPH 22 OF THE LEASE, TO PROVIDE ITS CONSENT TO THE REQUESTED ROAD CROSSING EASEMENT.

In its first claim of error, Defendant LWCC contends that this Court should reverse the lower courts' well-supported findings that Defendant was in default of its clearly stated obligation under Paragraph 22 of the lease to provide its consent to the requested road crossing easement, based upon its claim that the trial court and the Court of Appeals have failed to apply the well-established principle that clear and unambiguous contract language must be enforced as written with respect to the lease provisions governing defaults and notice of noncompliance. But while correctly acknowledging that clear language must be enforced as written, Defendant has improperly suggested that this Court should read additional requirements into the language of these provisions which the parties could have, but did not, include – an action which would run afoul of the well-established rule that courts may not re-write contractual agreements.

Specifically, Defendant has maintained that summary disposition cannot be granted in favor of Plaintiff Majestic Golf with respect to the requisite default because there are genuine issues of material fact as to: 1) Whether Plaintiff gave notice of Defendant's noncompliance and its impending default in compliance with the governing terms of the lease; 2) Whether Paragraph 22 of the lease required Defendant to provide its consent to the requested easement

in the form submitted with the notice of October 7, 2008; and 3) Whether Plaintiff's demand for compliance was withdrawn or otherwise negated by the correspondence of October 8, 2008 and October 13, 2008.

Plaintiff Majestic Golf contends that these claims should be rejected for lack of merit, for the reasons discussed in greater detail below. There is no basis for Defendant's claim that the trial court and the Court of Appeals have failed to apply the pertinent lease provisions as written, and the lower courts have correctly determined that there are no issues of material fact with respect to any of these questions.

A. DEFENDANT WAS IN DEFAULT OF ITS OBLIGATION UNDER PARAGRAPH 22 WHEN IT DID NOT PROVIDE THE REQUESTED CONSENT WITHIN 30 DAYS AFTER THE OCTOBER 7, 2008 NOTICE OF NONCOMPLIANCE.

There is no dispute that Majestic Golf requested Defendant's consent to the requested road crossing easement on a number of occasions, and that the requested consent was not provided. As noted previously, the request for the easement was first made to LWCC by way of Mr. Crouse's letter of October 27, 2006 (Apx. pp. 56b-59b; Crouse Affidavit, ¶ 8 – Apx. pp. 104a-105a) Majestic Golf presented its request to LWCC again in April of 2007, with a proposed "Grant of Easement." (Apx. pp. 60b-70b) Changes were discussed, none of which involved the location of the easement, and a revised Grant of Easements was delivered to LWCC on November 5, 2007. (Apx. pp. 92b-102b) Defendant LWCC did not execute and return the requested consent, but did not object to the terms of the proposed easement or present any proposed changes. (Crouse Affidavit, ¶¶ 10-12 – Apx. p. 105a) After Mr. Crouse later discovered that LWCC intended to link its consent to the easement to the closing of the proposed merger, he voiced his objection to this "linkage" in February and March of 2008, and continued thereafter to remind LWCC and its representatives that approval of the

requested easement was not contingent upon completion of the merger.[18] Majestic Golf's request for consent to the easement was reiterated no less than five times between May of 2007 and July of 2008. (Crouse Affidavit, ¶¶ 15-16 – Apx. pp. 106a-107a)

Defendant LWCC was given ample notice of its noncompliance with its obligation under Paragraph 22 to execute the requested consent by Mr. Crouse's letter of October 7, 2008 (Apx. p. 175a), which noted the prior unfulfilled requests and specifically requested compliance within 30 days, noting that the requested concurrence was "***urgently required.***"

There is no dispute that the requested consent was not executed and delivered within the 30-day period following the notice of noncompliance given by the letter of October 7, 2008, although it does appear that Majestic Golf's demand for compliance was shared internally between LWCC's Secretary, counsel, and negotiator during that period. (Apx. p. 121b) It was not until November 10, 2008 – **beyond the expiration of the 30-day period** – that LWCC presented Majestic Golf with redrafted merger documents which LWCC said it would not negotiate. (Crouse Affidavit, ¶ 18 – Apx. p. 108a) Neither Mr. Crouse nor his attorneys were permitted to review these "take it or leave it" documents prior to their presentation on November 10, 2008. The "take it or leave it" documents did not include an executed consent to the requested easement, or even a draft of a consent to the easement. Instead, the documents continued to provide that execution and delivery of any consent to the easement was conditioned upon execution and delivery of the merger documents. *Id.*

[18] In his supporting Affidavit, Mr. Crouse has testified that LWCC's negotiator, Mr. Henderson, had acknowledged to him that LWCC intended to link its execution of the required consent to the completion of the proposed merger. (Crouse Affidavit, ¶ 15 – Apx. pp. 106a-107a) This has not been refuted by LWCC's affidavits or any other documentary evidence submitted in support of, or opposition to, the cross-motions for summary disposition.

Under the clear and unambiguously stated terms of Paragraph 26 D., Defendant LWCC's failure to execute and deliver the requested consent within the 30-day period for compliance specified in the October 7, 2008 notice of noncompliance clearly constituted a default of LWCC's obligations under Paragraph 22. Under other clear and unambiguously stated terms of Paragraph 26, Majestic Golf had the right to terminate the lease for that default, as the Court of Appeals has correctly held.

B. DEFENDANT'S OBLIGATION TO GRANT ITS CONSENT TO THE REQUESTED ROAD CROSSING EASEMENT WAS CLEARLY ESTABLISHED BY THE UNAMBIGUOUS TERMS OF PARAGRAPH 22.

As noted previously, Paragraph 22 imposed a clearly-defined obligation to grant approval for road crossing easements upon request, **subject to only two requirements**: 1) That the easements be located in areas mutually agreeable to the parties; and 2) That the utilities and roads be installed so as to ensure the integrity of the golf course, leaving it in equal or better condition. (Apx. p. 20b) There is no dispute that this was an important provision, included in the lease for a very specific purpose. As Mr. Crouse's supporting Affidavit has explained, Waldenwoods' plan for development of the contemplated residential-recreation community depended upon its ability to secure necessary road easements across the golf course property to ensure that the planned developments of its adjoining property could be tied together cohesively. (Crouse Affidavit, ¶ 4 – Apx. p. 103a) This was well known to LWCC; the need for, and critical importance of, these road crossing easements for the protection and development of Waldenwoods' adjoining property was specifically discussed prior to the execution of the lease and the subsequent construction of the golf course. (Crouse

Affidavit, ¶ 5 – *Id.*) It is also undisputed that LWCC's obligation to provide the requested consent has never been altered by any amendment of the lease.[19]

There has never been any dispute as to the location of the desired easement. The location of the easement that LWCC finally said it would be willing to accept **after the termination of the lease** was the same as originally proposed in April of 2007.[20] It has not been disputed that Defendant LWCC has never proposed an alternative location. Nor has LWCC ever suggested that the construction of the road crossing in the location proposed would in any way diminish or compromise the integrity or condition of the golf course. LWCC never proposed any version of the easement that it was willing to sign until December 11, 2008 – **after the lease had been terminated for its failure to perform**. (Crouse Affidavit, ¶ ¶ 11, 12, 15 – Apx. pp. 105a-107a)

There is no support for Defendant's claim, on pages 33 through 35 of its Brief on Appeal, that it had no obligation to grant its consent to the requested road crossing easement in the form presented with the October 7, 2008 notice. Paragraph 22 of the lease required LWCC to "permit drainage and utility easements and road crossings to be developed by Landlord on the Premises as required to permit development to occur on Landlord's Other Real Estate." Defendant contends that it had no obligation to provide the requested consent

[19] Paragraph 43 of the lease, entitled "Entire Agreement," provides that "This Lease contains the entire agreement between the parties and cannot be changed or terminated orally, but only by an instrument in writing executed by the parties." (Apx. p. 32b) Defendant LWCC has acknowledged that Paragraph 22 was never amended or changed by any written instrument executed by the parties. (Response to Request to Admit No. 14 – Apx. p. 79b)

[20] The Court is invited to compare the version of the proposed easement originally presented to LWCC in April of 2007 (Apx. pp. 60b-70b), the revised Grant of Easement delivered to LWCC in November of 2007 (Apx. pp. 92b-102b), the Grant of Easements submitted to LWCC with the correspondence of October 7, 2008 (Apx. pp. 176a-188a) and the unexecuted Grant of Easement attached to the December 11, 2008 letter from LWCC's counsel (Apx. pp. 151a-164a) The location of the easement is the same in each version.

because its obligation to "permit" the installation of "road crossings" over the leased premises was not specifically described as an obligation to grant consent to a "road crossing easement." This argument is flawed for two reasons.

First, the Court should note that this argument was never raised in any of the lower court proceedings; it was raised for the first time in Defendant's Application for Leave to Appeal to this Court. In the proceedings below, Defendant has consistently maintained that it was not required to consent to the requested easement because it had been agreed that the easement would be provided as part of the contemplated merger. Defendant has never suggested, until appearing before this Court, that its consent was not required because Paragraph 22 did not contemplate an obligation to consent to ***easements*** for road crossings.[21] Because this claim was not preserved for review and has not been addressed by either of the lower courts, this Court should decline to consider it at all. It is axiomatic that our appellate courts generally do not consider issues raised for the first time on appeal. *See, e.g., Midwest Bus Corporation v Department of Treasury,* 288 Mich App 334, 351; 793 NW2d 246 (2010).

Second, Defendant's argument is based upon a proposed ultra-technical construction of Paragraph 22 which would render Defendant's contractual obligation to permit road crossings over the leased premises meaningless – a construction which should be rejected in favor of the obvious intent of the parties to provide for effective approval of necessary road

[21] During the motion hearing of December 3, 2009, Defendant's counsel acknowledged that Plaintiff "had a right pursuant to paragraph 22 to request that Lake Walden grant them an easement or easements for crossing easements in various parts of the golf course . . ." (Apx. p. 152b) And on page 18 of its Cross-Appellant's Brief in the Court of Appeals, LWCC referred to the "drainage and utility easements and road crossings" collectively as the "Easements" and conceded that "The Easements were required to permit Waldenwoods to develop the property it owned surrounding the golf facility." Defendant should not now be heard to claim otherwise in its presentation to this Court.

crossing easements expressed by the clear language of Paragraph 22. To say that the tenant must permit a road crossing over a leased property necessarily suggests the only reasonable construction of this language – that the permission must be granted by means of an easement or other suitable written conveyance allowing construction of the desired roadway.[22] It is wholly unpersuasive to suggest otherwise, and the novelty of the suggestion provides a ready explanation of why this argument was never raised in any of the lower court proceedings. The undisputed evidence has shown that this language was intended to have an important meaning, and the obvious meaning has been properly applied by the lower courts.[23]

Defendant has also argued, on pages 35 and 36, that it had no obligation to grant its consent to the requested road crossing easement because the proposed easement "failed to identify the size, design, specifications or grade of the road to be constructed within the easement," and thus, it was impossible to determine whether the road would be installed in such a manner as to ensure that the integrity of the golf course would be preserved, "leaving the golf course in equal or better condition." This, also, is meritless.

Although Paragraph 22 does require that the utilities and roads be ***installed*** so as to ensure the integrity of the golf course, leaving it in equal or better condition, it does not include any language requiring that the size, design, specifications or grade of a desired

---

[22] The statute of frauds, MCL 556.106, provides that: "No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing."

[23] "If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Alpha Capital Management, Inc. v Rentenbach, supra*, 287 Mich App at 611, quoting *Meager v Wayne State University,* 222 Mich App 700, 721-722; 565 NW2d 401 (1997). The Court should note, in this regard, that Defendant has not proposed any alternative construction of this language.

roadway be specified in an easement requested pursuant to that provision, nor does it contain any requirement that the easements be made reciprocal, as suggested in footnote 6 on page 9 of Defendant's brief.[24] Moreover, Defendant LWCC has not shown that there was ever any objection to the nature of the requested easement or the size,[25] design, specifications, or grade of the roadway, or that there was ever any expression of concern regarding any threat to the integrity or condition of the golf course.[26] Defendant simply ignored Plaintiff's request for approval of the proposed easement, and having chosen to do so, it should not be heard to complain that the proposed easement did not address objections never raised.[27]

Furthermore, LWCC has neglected to mention that these issues **were** adequately addressed in the proposed easement documents. As noted previously, the revised Grant of Easement delivered on November 5, 2007 included two new provisions requested by LWCC's land use committee, designed to ensure protection of the integrity of the golf course by requiring LWCC's approval of all plans for construction within the easement. These new requirements appeared in the form of a new Paragraph 6, providing that "All construction

---

[24] Paragraph 22 does not contain any requirement that an easement approved pursuant to that provision be made reciprocal, and thus, Defendant's objection that the requested easements were exclusive was, and continues to be, a red herring. Under Paragraph 22, the drainage, utility and road crossing easements were to be developed by the Landlord on the golf course property "as required to permit development to occur on Landlord's Other Real Estate." Thus, it is clear that the contemplated easements were easements which would be approved for the benefit of Waldenwoods.

[25] Defendant has failed to note that the size of the roadway **was** specified in the drawings attached to each version of the easement. (Apx. pp. 66b, 98b, 183a)

[26] As previously discussed, the requested easement provided for construction of the desired road between holes 21 and 22. Thus, the easement, and the road to be built within it, would not have disrupted play on any of the holes of the course.

[27] On page 9 of its brief, Defendant has stated that the parties had "disagreed over the language of the proposed Easement Agreement." There is no support in the record for this allegation. As previously discussed, Defendant did not raise any objections to the language of the easements proposed in November of 2007 or October of 2008.

within the easement shall be undertaken only pursuant to written plans approved by Lake Walden Country Club," and a new Paragraph 7, providing that "All reasonable care shall be taken during construction not to disturb the treescape north of and behind hole No. 21. The construction plans referred to in paragraph 6 shall describe the efforts to be taken to comply with this requirement." (Apx. p. 94b)

C. DEFENDANT LWCC WAS GIVEN NOTICE IN THE MANNER REQUIRED BY THE GOVERNING TERMS OF THE LEASE.

Defendant LWCC has argued that there was no default because it was not given notice of the impending default in the form and manner required by Paragraphs 26 and 31 of the lease. These claims were properly rejected by the lower courts, to the extent they were raised. They provide no basis for reversal of the Court of Appeals' decision.

Defendant begins this discussion with its complaint that the notice was deficient because it was not sent "by registered mail, postage prepaid, return receipt requested," as required by Paragraph 31 A. of the lease. This argument lacks merit for three reasons, and was therefore properly rejected by the Court of Appeals. First, this claim was not raised in the trial court; it was instead raised for the first time in Defendant's Cross-Appellant's Brief in the Court of Appeals, and was therefore unpreserved for appellate review.[28] Because this claim was not preserved for appellate review, this Court should decline to consider it at all.

[28] In the trial court proceedings, Defendant did allege that the Letter of October 7, 2008 did not constitute a proper notice of an impending default because it was not styled as such, and did not provide sufficient warning that continued noncompliance would constitute a default. Defendant's arguments in the trial court did not include any claim that the notice was not mailed in compliance with Paragraph 31 A. Its argument with respect to the sufficiency of the notice was concisely summarized by its trial counsel during the December 3, 2009 hearing on the cross-motions for summary disposition as follows: "He's received this letter and Mr. Hayes has no idea that that's a notice of default because it doesn't say default. That's point number one." (Apx. pp. 163b-164b) But in footnote 14 on page 22 of its brief, Defendant contends that it "clearly preserved this argument for appellate review," citing only the

Second, there is no record support for Defendant's claim that the notice was not mailed in compliance with the requirements of Paragraph 31 A. As the Court of Appeals correctly noted, the letter of October 7, 2008 (Apx. p. 175a) does not identify the manner in which the notice was sent, although the Court should note that it was properly addressed to LWCC's President at the address specified in Paragraph 31A. (Apx. p. 26b)[29] The Court should also note that Mr. Crouse's supporting Affidavit has specifically asserted, in Paragraph 17, that the notice and its attachment were "**mailed**" to LWCC, "**consistent with notice provisions contained in the lease.**" (Apx. p. 108a – emphasis added) This allegation is fully sufficient, on its face, as proof that the notice was mailed in the prescribed manner -- if the notice was not sent by registered mail as Paragraph 31 A. required, it could not have been said that the mailing to LWCC was "consistent" with the notice provisions of the lease – and this allegation has not been refuted by any affidavit or other documentary evidence presented by LWCC in support of, or opposition to, the cross-motions for summary disposition.[30]

---

discussion of this issue in the Court of Appeals' Opinion. Defendant has not included any reference to the record showing preservation of the issue in the trial court; it cannot do so because the argument was never raised in that forum.

[29] The notice of October 7, 2008 is on the letterhead of Waldenwoods Properties LLC and signed by Mr. Crouse. Obviously, Defendant's unsupported assumptions about the "customary practice" for business letters and its unsupported speculation that this letter was drafted by Mr. Crouse's attorney cannot serve as a basis for relief in this matter.

[30] Defendant has cited this Court's decision in *Picard v Shapero,* 255 Mich 699; 239 NW 264 (1931) for the proposition that an "affidavit stating notice of forfeiture was delivered was insufficient." Defendant's reliance upon *Picard* is misplaced for two reasons. First, Mr. Crouse's Affidavit does not merely state that the notice was delivered; it states, more specifically, that it was "**mailed** to LWCC, **consistent with notice provisions contained in the Lease.**" (Emphasis added) Second, the Court's decision in *Picard* did not address a grant or denial of summary disposition. The Court correctly held that presentation of an Affidavit was not a proper manner of proving delivery at trial. Motions for summary disposition are routinely decided on the basis of affidavits; in trial proceedings, affidavits are generally inadmissible as hearsay under the Rules of Evidence.

The Court should note, in this regard, that the specific allegation made in Paragraph 17 of Mr. Crouse's supporting Affidavit has not been refuted by Mr. Henderson's Affidavit, as Defendant has suggested on pages 23 and 24. The quotation from that Affidavit at the bottom of page 23 obviously refers to the statement made in Paragraph 14, that neither he, nor any shareholder or representative of LWCC had "received a notice from Majestic **that specifically declared a default** as required in paragraph 26 of the Lease." (Apx. p. 98a – emphasis added) Mr. Henderson's Affidavit contains no claim that the notice sent was not received, or that it was not delivered by registered mail.

Third, although the aforementioned circumstances should be amply sufficient to defeat this claim, it must also be noted that its essential factual premise is inaccurate. As Plaintiff has explained before to the Court of Appeals,[31] Majestic Golf is fully prepared to present admissible testimony and documentary evidence proving that the letter of October 7, 2008 and its enclosure were, in fact, sent "by registered mail, postage prepaid, return receipt requested" as required by Paragraph 31 A, if the Court should find it necessary to explore this issue further on remand.[32] Plaintiff has not presented this evidence before because the issue was never raised in the trial court, and thus, it has not become a part of the record on appeal.

[31] *See,* Plaintiff's Cross-Appellee's Brief, p. 30.

[32] If the Court should conclude that this question must be examined in further proceedings, it should note that it will not be necessary to prove that the letter, so mailed, was actually received. Paragraph 31 of the lease provides that notices "shall be effective for any purpose if given or served" as specified therein, and that "[e]very notice, demand, request or other communication hereunder shall be deemed to have been given or served at the time that the same shall be deposited in the United States mail, postage prepaid, in the manner aforesaid." (Apx. pp. 26b-27b)

Moreover, it has never been disputed that LWCC received prompt, actual notice of the October 7, 2008 notice.[33]

Defendant has also maintained that the notice of October 7, 2008 was deficient because it did not provide a clear warning that further noncompliance with Plaintiff's request would establish a default, triggering the remedy of forfeiture provided under the clear terms of the lease. This, also, is meritless. The trial court and the Court of Appeals have properly rejected LWCC's claim that the notice of October 7, 2008 was deficient because it was not styled as a "notice of default." As noted previously, Paragraph 26 did not require service of any "notice of default." That provision ***defines*** "default" to include a variety of acts and omissions, and the relevant provision – Subparagraph 26 D. – includes any failure to perform agreements, terms, covenants, or conditions of the lease which continues for 30 days after notice of the noncompliance among those acts and omissions. Subparagraph 26 D. does **not** contain any reference to a "notice of default." It does **not** require that the notice of non-compliance referenced therein be styled as a "notice of default," nor does it contain any requirement that a notice of noncompliance contain any reference to a "default" or its potential consequences. Inclusion of such language would have been inappropriate because, under Subparagraph 26 D., a failure to perform does not ripen into a "default" until it has continued for 30 days after notice of the noncompliance has been given.

[33] The e-mail message of October 8, 2008 (Apx. 173a-174a) states that the letter requesting concurrence in the crossing easement was attached as Attachment 2, and LWCC has acknowledged, on page 11 of its brief, that the requested Consent to Easement was also attached to that e-mail. On page 24 of its brief, Defendant argues that actual notice or knowledge "cannot trump the written terms of the contract." Plaintiff has not suggested this. It has instead noted the undisputed fact that LWCC received prompt actual notice as a further basis for the Court to conclude that the alleged technical failure to comply with the registered mail requirement of Paragraph 31 should not be considered at all because the objection was never raised in the trial court, and thus, has not been preserved for appellate review.

The clear language of the provision speaks for itself:

> "26. **DEFAULT**. Each of the following events shall be a default hereunder by Tenant and a breach of this Lease.
>
> * * *
>
> "D. If Tenant shall fail to perform any of the agreements, terms, covenants, or conditions hereof on Tenant's part to be performed (other than payment of rent) and such non-performance shall continue for a period within which performance is required to be made by specific provision of this Lease, or if no such period is so provided for, a period of thirty (30) days after notice thereof by Landlord to Tenant, or if such performance cannot be reasonably had within such thirty (30) day period, Tenant shall not in good faith have commenced such performance within such thirty (30) day period and shall not diligently proceed therewith to completion;" (Apx. p. 21b-22b)

Defendant is asking this Court to read additional requirements into the language of Paragraph 26 D. – requirements which the parties could have included, but did not. The Court should decline this invitation because to do so would obviously run afoul of the well-established principle that courts will not re-write clearly expressed contractual agreements. As Defendant has correctly acknowledged on page 19 of its brief, reading additional requirements into an unambiguous notice provision is improper, as it disregards this Court's precedents and frustrates the parties' right to contract freely. *DeFrain v State Farm Mutual Auto Insurance Co., supra,* 491 Mich at 368.

There is no basis for Defendant's exaggerated suggestion that the notice of October 7, 2008 was a "stealth notice." That notice satisfied all of the requirements of Paragraph 26 D., and as previously discussed, the evidence has shown that its receipt prompted high level discussions at LWCC, but no response or compliance.[34] Nor is there any basis for

[34] On page 26, Defendant complains that the use of ordinary mail and innocuous language "induced inaction." The Court might well be prompted by this to ask how a statement that compliance was "urgently required" could have induced inaction.

LWCC's claim that it was not afforded a fair opportunity to cure. Paragraph 26 D. and the notice of October 7, 2008 afforded LWCC an ample opportunity to cure its noncompliance by providing the requested consent within 30 days. LWCC chose to forego that opportunity when it chose to ignore Majestic Golf's notice of noncompliance.

D. PLAINTIFF'S DEMAND FOR COMPLIANCE WAS NOT WITHDRAWN OR OTHERWISE NEGATED BY THE CORRESPONDENCE OF OCTOBER 8 AND 13, 2008.

Defendant LWCC has continued to argue that it was not necessary to comply with the October 7, 2008 demand for consent to the requested road crossing easement because there had been an agreement that the easement would be provided later, as a part of the merger. Defendant also contends, in a similar vein, that the demand for compliance made by the notice of October 7, 2008 was somehow "withdrawn" or otherwise negated by the subsequent correspondence of October 8 and 13, 2008. These arguments were properly rejected by the trial court and the Court of Appeals because they are not supported by the evidence presented. They should be rejected by this Court as well.

As the trial court correctly observed in its Opinion and Order of December 23, 2009, Mr. Crouse's e-mail message of October 8, 2008 "does not contextualize away the sufficiency" of the October 7, 2008 notice, but instead, "bolsters it." (Apx. p. 43a) The same may also be said of his correspondence of October 13, 2008. (Apx. pp. 168a-172a)

The e-mail message of October 8, 2008 expressed Mr. Crouse's hope that a merger agreement could still be finalized, but noted that critical issues had remained unresolved after the last meetings, and thus, Mr. Crouse had found it necessary to prepare for the possibility that the merger would not be completed "because the differences are found to be irreconcilable." (Apx. p. 173a) Viewed in proper context, this message cannot be seen as any

form of suggestion that Plaintiff's request for compliance could be ignored pending final completion or failure of the merger negotiations which were then so seriously jeopardized. It was, instead, a clear expression of Mr. Crouse's desire and intent to secure the required consent pursuant to Paragraph 22 of the lease within 30 days, as an independent means for protecting the rights of Waldenwoods and Majestic Golf.

In his subsequent letter of October 13, 2008 to Pat Hayes, Mr. Crouse discussed the issues which had led to a "slow death" of the merger negotiation process. Mr. Crouse concluded that letter with his observation that: "It is very clear to me that we are headed for a train-wreck, unless something extraordinary and unexpected happens." (Apx. pp. 171-172) In light of the views expressed in this correspondence, it should have been abundantly clear that completion of the contemplated merger was by no means assured or expected.

Plaintiff invites the Court to carefully review these messages and determine their meaning for itself. They do not support Defendant's claims because they simply do not, and cannot, convey the meaning that Defendant has suggested to any reasonable mind. It is, quite simply, an unparalleled exaggeration to characterize these pieces of correspondence as a "blizzard of contradictory communications" suggesting an intent to waive or withdraw the demand for prompt compliance communicated in the notice of October 7, 2008.

Viewed in a light most favorable to LWCC, the evidence presented to the trial court in this matter has shown **only** that LWCC proposed to link the consent to the requested easement with the closing of the merger in the initial merger documents provided to Majestic Golf by LWCC's counsel in December of 2007, and that Mr. Crouse did not object to this suggestion

in his initial response to the proposed documents made on February 12, 2008.[35] Defendant's assertion that this "agreement" never changed has been solidly refuted by Mr. Crouse's very specific assertions, which have **not** been refuted, that he subsequently objected to any such "linkage" in February and March of 2008, and continued to do so on several occasions thereafter. (Crouse Affidavit, ¶¶ 15-16 – Apx. pp. 106a-108a)

LWCC's claim that Mr. Crouse consented to this "linkage" is also solidly refuted by the clearly stated demand for compliance with Defendant's obligations under Paragraph 22 within 30 days presented by the notice of October 7, 2008. Upon receipt of that notice, LWCC's principals clearly knew, or should have known, that there was no longer any agreement (if ever they thought there was) to link consent to the easement with completion of the merger, and that execution of the required consent was then expected, and required, without further delay.[36] Moreover, LWCC has never offered any authority or justification for its attempt to link its consent to completion of the merger. There was no authority to do so under the terms of the lease. LWCC was required, by Paragraph 22, to provide its consent. It had no right to hold the required consent hostage, pending the accomplishment of its own unrelated objectives.

[35] There is no other record support for Defendant's suggestion, on pages 8 and 26, that Mr. Crouse acquiesced in the proposed "linkage" in multiple drafts of the merger documents.

[36] Under these circumstances, there is clearly no factual support for Defendant's claim that its noncompliance may be excused on grounds of waiver or estoppel.

III. THE GOLF COURSE GROUND LEASE AT ISSUE WAS PROPERLY TERMINATED, IN ACCORDANCE WITH ITS CLEAR AND UNAMBIGUOUS TERMS, FOR DEFENDANT'S DEFAULT IN THE PERFORMANCE OF ITS CLEARLY DEFINED OBLIGATION, UNDER PARAGRAPH 22 OF THE LEASE, TO PROVIDE ITS CONSENT TO THE REQUESTED ROAD CROSSING EASEMENT.

As previously discussed, LWCC's default was established when it failed to comply with its obligations under Paragraph 22 for a period of 30 days after Majestic Golf provided its written notice of noncompliance on October 8, 2008. Thus, LWCC's default was established as of November 7, 2008. On November 24, 2008, with LWCC still in default of those obligations, Majestic Golf exercised its right to terminate the lease for LWCC's established default. The Court of Appeals has properly held that Majestic Golf was entitled to terminate the lease as a remedy for that default under the clear and unambiguously stated terms of Paragraph 26, without regard to the materiality of the breach. The rights of the parties were clearly defined by the terms of their written agreement, and Majestic Golf was entitled to have that agreement enforced as written.

The decision of the Court of Appeals is well supported by the precedents of this Court holding that unambiguous contractual language must be enforced as written. *See, Bloomfield Estates Improvement Ass'n of Birmingham*, 479 Mich 206; 737 NW2d 670 (2007); *Rory v Continental Insurance Co.*, 473 Mich 457; 703 NW2d 23 (2005); *Wilkie v Auto-Owners Insurance Co.*, 469 Mich 41; 664 NW2d 776 (2003). As this Court reiterated in *Bloomfield Estates Improvement Ass'n of Birmingham*, which applied the holding of *Rory* and *Wilkie* to a case involving enforcement of deed restrictions, the freedom of contract "deeply entrenched" in Michigan common law allows parties the freedom to define the scope of their rights and obligations with the expectation that those rights and obligations will be enforced as *they* have

chosen. Thus, unambiguous contracts are not open to judicial construction, and must be enforced as written unless a particular contractual provision is found to be in violation of law or public policy. 479 Mich at 212-213.

While acknowledging these well-reasoned precedents, Defendant notes that this Court has the authority to craft a public policy exception for forfeiture provisions in lease agreements if it should be inclined to do so. Defendant then goes on to suggest, without actually advocating the adoption of such an exception, that the Court "should hold that a lease of real property cannot be terminated for a default that is not material, reverse the Court of Appeals and reinstate the judgment of the trial court on that issue" if it should wish to "carve out" a public policy exception for this purpose. Plaintiff respectfully suggests that this half-hearted invitation should be declined. Defendant has failed to demonstrate a need for such an exception which could justify the uncertainty and unnecessary limitation of freedom of contract which would inevitably result. Plaintiff respectfully suggests that if such an exception is to be established, it should be established by duly enacted legislation, not by a decision of this Court.[37]

The Court of Appeals has correctly determined that enforcement of Plaintiff's contractual right to terminate the lease for LWCC's default does not violate any provision of law or consideration of public policy. In *Rory,* this Court emphasized (and Defendant has acknowledged) that determination of Michigan's public policy is not a matter of judicial preference; such policies must be "clearly rooted in the law." 473 Mich at 470-471.

[37] Presumably, a legislative enactment establishing such an exception could not be applied retroactively to impair vested contractual rights. Const 1963, art 1, § 10 prohibits the enactment of any law impairing the obligation of contract.

Enforcement of Majestic Golf's contractually guaranteed right to terminate this lease for LWCC's default does not offend interests protected by any constitutional or statutory provision. Nor is enforcement of the clear and specific termination and forfeiture provisions of this lease prohibited by any rule of Michigan's common law. Thus, enforcement of those provisions cannot be denied on grounds of any presently-recognized public policy of this state.

It may be acknowledged that the Legislature has imposed statutory restrictions applicable in other contexts, but none of those restrictions apply to this case, as Defendant has conceded on page 38 of its brief. Thus, it is not accurate to suggest, as Defendant has on page 37, that "the applicable public policy is found in the statute law." Although MCL 600.5726 requires a material breach for forfeiture of a land contract, the legislature has not chosen to require proof of a material breach for termination of a lease pursuant to a power to terminate provided therein.[38] MCL 554.46 precludes forfeiture of interests in real property for failure to perform substantively insignificant conditions – conditions which "are merely nominal and evince no intention of actual or substantial benefit to the party to whom or in whose favor they are to be performed" – but this provision obviously has no application in this case, where reservation of the lessor's right to secure consent to utility and road crossing easements was specifically provided for in Paragraph 22 "to permit development to occur on Landlord's

[38] MCL 600.5714(1)(c)(i) allows a landlord to recover possession of leased premises in cases where the lessee holds over "[a]fter termination of the lease, pursuant to a power to terminate provided in the lease or implied by law." This provision does not preclude a termination for non-payment of rent where that right has been specifically reserved in the lease. But in any event, Defendant's citation of MCL 600.5744 is unhelpful because the breach at issue in this case did not involve a non-payment of rent.

Other Real Estate." Defendant has not suggested that enforcement of the forfeiture provision at issue here could be denied under MCL 554.46.

It may be acknowledged that the reported decisions have often stated that forfeitures are not favored. Thus, it has also been frequently noted that termination of a lease will not be enforced in the absence of a written provision specifically authorizing the termination for default in the performance of its terms, and that such provisions are to be strictly construed against the lessor. *See, e.g., In re State Highway Commissioner*, 365 Mich 322; 112 NW2d 573 (1961); *McPheeters v Birkholz,* 232 Mich 370; 205 NW 196 (1925); *Hersey Gravel Co v Crescent Gravel Co*, 261 Mich 488; 246 NW 194 (1933); *Steinberg v Fine,* 225 Mich 281; 196 NW 367 (1923); *United Coin Meter Co v Lasala*, 98 Mich App 238; 296 NW2d 221 (1980).

This, however, is the extent to which "public policy" may be said to preclude termination of a lease as a remedy for an established default. The decisions of this Court have always recognized that a right of termination may be contracted for. *See, e.g., McPheeters v Birkholz, supra,* 232 Mich at 376-377; *Hersey Gravel Co v Crescent Gravel Co, supra; Miller v Havens,* 51 Mich 482, 485; 16 NW 865 (1883); *Steinberg v Fine,* 225 Mich 281; 196 NW 367 (1923) (Forfeiture of lease denied where the Court concluded that the alleged default did not fall within the scope of the lease's forfeiture provision, as strictly construed.); *United Coin Meter Co v Lasala, supra,* 98 Mich App at 242 ("A landlord is not permitted to forfeit a lease and reenter the premises upon breach of a covenant by the tenant absent a condition in the lease giving him such a right. . . There was no such provision in the instant lease.")

Thus, although Michigan courts have denied enforcement of requests for termination or forfeiture in the absence of a sufficiently specific contractual right appearing in the terms of

the written lease agreement, such requests have been faithfully enforced in cases such as this, where the remedy has been specifically provided for and the default in question provides a clear basis for its application. In the case of *Campbell v Homer Ore Company,* 309 Mich 693, 697; 16 NW2d 125 (1944), for example, this Court held that the plaintiff lessor was entitled to terminate the mining lease at issue for the defendant's violation of a covenant providing a valuable right[39] to the lessor pursuant to the forfeiture clause contained therein. Similarly, in *White v Huber Drug Co.,* 190 Mich 214; 157 NW 60 (1916), this Court enforced the forfeiture provision of the lease at issue, based upon the lessor's claim that the lease had been assigned to another party in violation of a covenant prohibiting such assignments. 190 Mich at 215-216.

Thus, it may be seen, and Defendant has not disputed, that Michigan's common law has long recognized that termination of a lease and forfeiture of the lessee's interests therein may properly be enforced where the remedy of termination has been specifically provided for in the lease agreement and a default clearly falling within the scope of the strictly construed forfeiture provision has been established. The reported decisions have not discussed materiality of the breach as a necessary element for enforcement of a termination and forfeiture in such cases.[40] It is, instead, a simple question of what the parties have agreed upon

---

[39] Forfeiture of the lease for violation of a merely nominal covenant evincing no intention of actual and substantial benefit to the lessor would have been precluded under 1929 CL § 12966, the substantively identical predecessor of MCL 554.46. But that provision can provide no basis for relief from the forfeiture of the lease in this case for the reasons previously discussed.

[40] In *Steinberg v Fine, supra,* this Court specifically recognized that a lessor may have a right to declare a forfeiture pursuant to a forfeiture clause in a lease regardless of whether he has suffered any damage as a result of the lessee's breach, noting that "while the plaintiff may have a right to declare a forfeiture regardless of whether he has suffered any damages by reason of the defendant's breach, the court, following its policy of strict construction, will limit his right to a breach of the exact provisions of the forfeiture clause." 225 Mich at 285.

as a remedy for violation of the lease's terms and conditions. Thus, to say that forfeitures are disfavored does not excuse enforcement of a termination and forfeiture when these remedies are pursued in accordance with the clear and unambiguous terms of a lease agreement.

Ignoring the remedy of termination in a lease re-writes the parties' agreement, and this is not permissible, even under notions of equity. *McDonald v Farm Bureau Insurance Co.,* 480 Mich 191, 199-200; 747 NW2d 811 (2008) ("Just as courts are not to rewrite the express language of statutes, it has long been the law in this state that courts are not to rewrite the express terms of contracts.") "It is neither unfair nor inequitable to give effect to an agreement which was not induced by mistake, overreaching, fraud or misrepresentation." *Christner v Anderson, Nietzke & Company, PC,* 433 Mich 1, 12-13; 444 NW2d 779 (1989), quoting *Michigan Medical Service v Sharpe*, 339 Mich 574, 577; 64NW2d 713 (1954). Thus, equity does not provide relief from hard bargains simply because they are hard. *Lenawee County Gas & Electric Co., v City of Adrian*, 209 Mich 52, 57; 176 NW 590 (1920). And although equity dislikes a forfeiture, "where parties have, by lawful contract, expressly provided for a forfeiture, equity is not squeamish about granting what they have agreed to." *Village of Grandville v Grand Rapids, Holland & Chicago Railway,* 225 Mich 587, 593-594; 196 NW 351 (1923).

In this case, there has been no claim of mistake, overreaching, misrepresentation, or fraud in the inducement. The parties on both sides are sophisticated businessmen, ably assisted by competent counsel, who have dealt with each other at arm's length to reach the agreement now at issue. They have agreed that the lease may be terminated at the lessor's option, in accordance with the specified procedures, for any of the forms of default defined therein. The default is clear, as the trial court and the Court of Appeals have correctly found,

and the termination has been properly declared according to the clear terms of the lease. There is no basis to conclude that enforcement of the parties' agreement would be unconscionable, as the Court of Appeals has also correctly held.

It may be acknowledged that the material breach doctrine has been recognized and applied in Michigan in other contexts.[41] Application of that doctrine has been useful and appropriate in cases where a contractual agreement has not specified a remedy for the breach

---

[41] In footnote 21 on page 39 of its brief, in its discussion of those "other contexts," Defendant asserts that Plaintiff committed the first material breach of the lease in February and October of 2008 by recording deed restrictions not authorized by the lease, and suggests that this should excuse its failure to provide the required consent or diminish the materiality of the breach. The Court of Appeals rejected this complaint, now presented in its entirety within the aforementioned footnote, observing that Defendant had failed to explain how this action had violated the terms of the lease or why this alleged "breach" should have excused defendant's failure to perform. (Apx. 28a) Defendant's statement of the issues has not identified this alleged "first breach" as one of its grounds for relief, and the abbreviated discussion of the issue in footnote 21 has not remedied the lack of specificity noted by the Court of Appeals.

The essence of Defendant's argument in the Court of Appeals seems to have been that, if the golf course property should eventually have been sold to LWCC pursuant to an exercise of the option to purchase, Majestic Golf would have been required to provide a warranty deed conveying the property, subject only to the restrictions which were in place when the lease was signed in 1992. But although the deed restrictions recorded in 2008 imposed additional restrictions which were somewhat broader in scope than the terms of the lease – restrictions designed to protect the interests of Waldenwoods if a merger were concluded – the filing of those deed restrictions did not constitute a breach of the lease because the option to purchase was never exercised prior to the termination of the lease, and thus, Majestic Golf was never called upon to deliver a warranty deed in compliance with Paragraph 17(E). Although LWCC might have had a claim that certain provisions of the deed restrictions would have to be rescinded before closing if the property were sold to LWCC pursuant to the option, the filing of the deed restrictions in question could not ripen into a breach of the lease until that time, and there would not have been any violation at that time if Plaintiff and Waldenwoods filed an appropriate amendment. Defendant's apparent assumption that the terms of the lease would have been breached upon the occurrence of a sale that never occurred is based upon pure speculation, and Defendant has not explained how its clearly-established breach of the lease could have been excused by the mere possibility that a breach might have been committed by Plaintiff at some time in the future. Moreover, the Court should also recall, in this regard, that Defendant's presentation has greatly exaggerated the substance of the amended deed restrictions recorded on October 3, 2008. *See*, fn. 17, *supra.*

in question, and the court must therefore decide whether the breach was sufficiently severe and important to warrant a rescission of the contract, or to justify a repudiation of an obligation imposed thereby. But Michigan's reported appellate decisions have not applied the material breach doctrine to commercial leases in cases such as this, where the lease includes a clear and unambiguous forfeiture provision allowing termination of the lease and forfeiture of improvements as the agreed-upon remedy for a tenant's breach of the lease.

Defendant's reliance upon decisions discussing materiality of the breach as an element of rescission is misplaced because there is a fundamental difference between a request to grant rescission of a contract for a claimed material breach or repudiation of contract terms and a request for enforcement of a specifically provided remedy. As the authors of *Corpus Juris Secundum* have aptly explained:

> "A forfeiture, is that which is lost, or the right to which is alienated, by a breach of the contract. Unless there is a provision in a contract clearly and expressly allowing forfeiture, breach of a covenant does not justify cancellation of the entire contract, and courts will generally uphold a forfeiture only where a contract expressly provides for them. **The declaration of a forfeiture for the breach of a condition of a contract, in accordance with a stipulation therein, is to be distinguished from a rescission of the contract in that it is an assertion of a right growing out of it. It puts an end to the contract and extinguishes it in accordance with its terms similarly to the manner in which it is extinguished by performance.** Forfeiture terminates an existing contract without restitution, while a rescission of such contract terminates it with restitution and restores the parties to their original status. (17 B CJS, Contracts, § 450, pp. 66-67 – Emphasis added)

Defendant's presentation has included an abbreviated discussion of decisions from other states. Some of those foreign decisions have held that enforcement of a clearly applicable forfeiture provision may be denied if the court determines, as a matter of equity, that the breach or default in question was not material. But these decisions are unhelpful because they are not binding as precedent in these proceedings, and are plainly inconsistent

with the controlling decisions of this Court which have repeatedly held that clear and unambiguous contractual remedies must be enforced as written because *our* courts are not in the business or rewriting contractual agreements. Defendant has not shown that there is any valid reason for departure from those precedents.

The foreign decisions which have refused to enforce clear and unambiguous forfeiture provisions based upon a weighing of materiality are less deferential to freedom of contract and more open to expansive interpretation of statutory enactments than this Court's decisions have found to be appropriate. The Arizona Supreme Court's decision in *Foundation Development Corporation v Loehmann's, Inc.*, 163 Ariz 438; 788 P2d 1189 (1990) – the case most prominently cited in the listed decisions – is a good example. In that case, the lease in question included a clear and unambiguous forfeiture clause, similar to the one involved here, which allowed the landlord to terminate the lease for any uncured failure to pay rent or other obligations. 788 P2d at 1190-1191. There was also a statute on point, which granted the landlord an unqualified right to terminate the lease for a breach of any lease provision, with or without a contractual provision establishing that right. *Id.* at 1193-1194. Nonetheless, the Arizona Court concluded that the lease did not permit a forfeiture for the alleged non-payment because the tenant's delay in making payment was not a material breach, and held that "absent some express statement of legislative intent, we are hesitant to believe that, in enacting A.R.S. § 33-361, the legislature intended to permit forfeitures under any and all circumstances..." *Id.* This analysis was plainly inconsistent with the governing precedents of this Court which require enforcement of clear contractual language as written, and interpret statutory enactments based upon what the clear statutory language ***does*** say, without assumptions based upon statements that the Legislature ***could*** have included.

Finally, Plaintiff suggests that this case does not present a necessity or appropriate vehicle for adoption of a new rule, even if a weighing of materiality might be found appropriate under some other circumstances in cases such as this, because there was clearly no basis for the trial court's finding that the breach establishing the default was not material under the circumstances of this case, which clearly suggest that Defendant's failure to execute and deliver the required consent was a flagrant and willful disregard of a clearly-stated obligation of great importance to Majestic Golf and Waldenwoods, committed and continued in bad faith as a means for thwarting Waldenwoods' development of its adjoining property and/or securing an unfair advantage in the negotiation of the contemplated merger.[42]

RELIEF

WHEREFORE, Plaintiff – Appellee Majestic Golf, LLC, respectfully requests that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for Appellee Majestic Golf, LLC

By: _____

Graham K. Crabtree (P-31590)
Thaddeus E. Morgan (P-47394)
124 W. Allegan Street, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

Dated: June 27, 2013

[42] The limited space allowed for this response does not permit further discussion of the circumstances relevant to the materiality of the breach. Those circumstances have been addressed at length in the briefs filed by Majestic Golf in the Court of Appeals. Again, because Plaintiff challenged the trial court's finding that the breach was not material in its appeal to the Court of Appeals but the Court did not address that issue in light of its conclusion that a weighing of materiality was inappropriate, this Court may wish to remand this matter to the Court of Appeals for consideration of this issue if it should ultimately determine that the materiality of the breach should be evaluated.